IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 9TH OCTOBER 2007 / 17TH ASWINA 1929

SA.No. 298 of 1994()

AS.58/1989 of ADDL. DISTRICT COURT, THODUPUZHA
OS.56/1984 of MUNSIFF COURT ,THODUPUZHA
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APPELLANTS: (APPELLANTS- DEFENDANTS 1 AND 2)
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1. **CHELLAPPAN, SON OF CHENNI,**
   PUTHENPURAYIL HOUSE, OLAMATTOM KARA,
   THODUPUZHA VILLAGE.

2. **PRABHAVATHY, WIFE OF CHELLAPPAN,**
   PUTHENPURAYIL HOUSE,
   OLAMATTOM KARA, THODUPUZHA VILLAGE.

BY ADV. SRI.B.JAYASANKAR
SRI.DINESH R. SHENOY

RESPONDENTS: (RESPONDENTS- PLAINTIFFS & DEFENDATNS 3 TO 8)
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1. **RAJESWARI, D/O. VETTILA PAI,**
   KUNNATHUMADAM,. OLAMATTOM KARA,
   THODUPUZHA VILLAGE.

2. **RAJAKUMARI, D/O. DO. DO.**

3. **V.RAVINDRA PAI, S/O. DO. DO.**

4. **V.RAJAGOPAL, S/O. DO. DO.**

5. **RAMESH KUMAR, KUNNATHUMADAM DO. DO.**

6. **V.RAJENDRAN, S/O. VETTILA PAI, DO. DO.**

tss

7. VETTILA PAI, S/O. LATE DAMODARA PAI, DO. DO.

8. N.SUBHADRA BAI, W/O. VETTILA PAI, DO. DO.

ADDRESS FOR SERVICE IS AS SHOWN ABOVE.

BY ADV. SMT.ANSAMMA MATHEW - R3 - R8
SMT.V.A.KASTHURI - R1 & R2

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 09/10/2007, ALONG WITH SA NO.702 OF 1994 SA NO. 312 OF 1994 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

tss

M.SASIDHARAN NAMBIAR,J.

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S.A.NOs.298/94,312/94, & S.A. 702 OF 1994

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Dated this the 9th day of October, 2007

JUDGMENT

Appellants in S.A.312/1994 and S.A.702/1994 are the plaintiffs and appellants in S.A.298/1994 are defendants 1 and 2 in O.S.56/1984 on the file of Munsiff Court, Thodupuzha. Plaint schedule property is 15 cents in survey No.310/13B/2 of Thodupuzha village. It admittedly originally belonged to the third defendant father. Fourth defendant is his wife. Plaintiffs and defendants 5 to 8 are their children. Under Ext.A1 settlement deed, father settled three acres in survey Nos.310/13B/3/2/88, 110/13A/1, 310/13B/1 of Thodupuzha Village, including the disputed 15 cents in favour of his children plaintiffs and defendants 5 to 8. Though fourth defendant was also one of the executants of Ext.A1 settlement deed, no property was settled in her favour and she was only representing her minor children.

Subsequently fourth defendant mother representing the minor children defendants 6 to 8, along with the fifth defendant who was then a major and father, third defendant, who had no right in the property by virtue of Ext.A1 settlement deed, executed Ext.A2 sale deed dated 29.1.1976 transferring 15 cents of the property, for consideration in favour of defendants 1 and 2. The suit was instituted contending that fourth defendant is not the natural guardian of minor children and the sale deed was executed without obtaining leave of the court as provided under section 8(2) of Hindu Minority and Guardianship Act,1956 and therefore Ext.A2 sale deed is not valid and binding on the plaintiffs who are minors, seeking a decree to set aside Ext.A2 and recovery of possession of the property. It was contended that the sale was not for the benefit or welfare of the minors and therefore plaintiffs along with defendants 5 to 8 are entitled to recover possession of the property covered under the sale

deed with mesne profits. Defendants 1 and 2 in their joint written statement contended that the property was purchased by them for valuable consideration under Ext.A2 and it is perfectly valid and sale was effected for raising money for the protection and also for the educational expenses of the minor children and fourth defendant mother is competent to execute the sale deed on behalf of her minor children and therefore plaintiffs are not entitled to the decree sought for. Subsequently defendants 1 and 2 amended the written statement incorporating a prayer for partition of the whole properties obtained by defendants 5 to 8, contending that even if Ext.A2 is not binding on the minors, defendants 1 and 2 are entitled to get the property covered under Ext.A1 allotted as the share due to the fifth defendant.

2. Learned Munsiff on the evidence of PW1, DW1 and Exts.A1 and A2 found that Ext.A2 sale deed was executed by fifth defendant who was then major

along with fourth defendant mother representing the minor chidlren defendants 6 to 8 and she is not the natural guardian of the minor children and therefore is incompetent to represent them and no leave of the court as provided under section 8(2) of Hindu Minority and Guardianship Act was obtained taken and therefore the sale deed is not valid and binding on the minor except fifth defendant. Finding that under Ext.A3, defendants 1 and 2 are only entitled to get 1/6 share of fifth defendant, a preliminary decree was passed setting aside Ext.A2 sale deed and declaring that Ext.A2 sale deed is not binding on plaintiffs and defendants 6 to 8 and plaintiffs are entitled to 2/6 shares and recover recover possession of their share after partition. Holding that appellants are entitled to value of improvements it was directed that the liability is to be decided in the final decree proceedings. Challenging the decree providing for payment of value of improvements, plaintiffs filed A.S.58/1989 before Additional District Court,

Thodupuzha. Challenging the decree granted in favour of plaintiffs, defendants 1 and 2 filed A.S.64/1989. Learned District Judge originally allowed the appeals on 10.7.1991, remanding the suit back to the trial court for considering the question of maintainability of the suit on the ground of partial partition, deed holding that under Ext.A2 defendants 1 and 2 have obtained share of fifth defendant and the right of equity could be worked out, only if partition of the entire three acres was sought. Plaintiffs challenged order of remand before this Court in C.M.A. 267/1991 and C.M.A.268/1991. This court, as per judgment dated 10.12.1992, set aside the order of remand and directed first appellate court to dispose the appeals afresh, in the light of the observations made thereunder. This court in C.M.A.267/1991 considered the finding of first appellate court regarding partial partition and finding that under Ext.A2, defendants 1 and 2 obtained only the right of fifth defendant over 15

cents of property covered thereunder, it was held that defendants 1 and 2 could only step into the shoes of the fifth defendant to that extent of the property covered under in Ext.A2 and therefore the plea of partial partition is not sustainable. It was also held that first appellate court was not justified in holding that defendants 1 and 2 had a right to proceed against the undivided share of fifth defendant over the remaining 2/6 acres covered under Ext.A1 settlement deed. Learned Additional District Judge as per common judgment dated 28.6.1993, dismissed both the appeals confirming the decree and judgment passed by the trial court. Challenging the dismissal of the appeal filed by defendants 1 and 2 S.A.298/94 was filed. Challenging the dismissal of the appeals filed by plaintiffs S.A.312/94 and S.A.702/94 were filed.

3. The following substantial questions of law were formulated in S.A.298/1994.

1. Whether plaintiffs who are only two of the

co-owners, are entitled to claim the relief of setting aside Ext.A2 sale, as against defendants 6 to 8 also.

2. Whether finding of courts below that under Ext.A1 settlement deed only defendants 5 to 8 are entitled to the property and therefore defendants 1 and 2 are only entitled for 1/6 shares, due to fifth defendant is sustainable.

4. The second appeals were admitted formulating the following substantial questions of law.

1. Whether finding of courts below that defendants 1 and 2 are bona fide purchasers for valuable consideration is sustainable and if so, whether they are entitled to the value of improvements.

5. Learned counsel appearing for appellants and respondents were heard.

6. Ext.A2 is the settlement deed under which respective parties are claiming their right. Ext.A1 establishes that the property originally

belonged to third defendant. He settled the property in favour of his children, both in the first wife and second wife fourth defendant. D schedule consisting of three acres was set apart to plaintiffs and defendants 5 to 8 who were then minor children. In Ext.A1, minor children were represented by their mother 4th defendant. The argument of learned counsel appearing for appellants in S.A.298/1994 is that though while setting apart D schedule property it was not specifically stated that the property is set apart to the fourth defendant wife also, as she was shown in the document on her own behalf also, the allotment could only be for fourth defendant also, as she is the wife and therefore finding of courts below that fourth defendant has no independent right over the property is not sustainable. Though argument is attractive, it cannot be accepted. Neither fourth defendant, nor the minor children have any pre existing right in the property covered under Ext.A1. They obtained

right only as settled in their name by the father third defendant under Ext.A1. As defendants 5 to 8, the children, were minors, they were represented in the settlement deed by fourth defendant mother. Ext.A1 specifically shows that D schedule property was allotted and set apart to defendants 5 to 8. It was not allotted or set apart to fourth defendant or defendants 5 to 8 and fourth defendant. In such circumstances, it cannot be said that D schedule property was allotted to the fourth defendant, along with her minor children. As D schedule property was set apart to defendants 5 to 8 alone, they alone are entitled to a share in the property, as rightly found by the courts below. Therefore fifth defendant is only entitled to 1/6 share.

7. Ext.A2 sale deed was thereafter executed in 1976 whereunder 15 cents, out of 3 acres obtained as D schedule under Ext.A3, was purchased by appellants in S.A.298/1994. It was executed by fifth defendant, the mother, fourth defendant, who

was representing defendants 6 to 8 the then minors and also by third defendant. Courts below found that fourth defendant mother is not the natural guardian and no leave of the court as provided under section 8(2) of Hindu Minority and Guardianship Act, 1956 was taken and therefore the alienation in respect of the rights of the minor plaintiffs and defendants 6 to 8 are not binding on them. The argument of learned counsel appearing for appellants in S.A.298/1994 is that apart from mother, third defendant father is also one of the executants of Ext.A1 and therefore the courts below should have found that third defendant being the natural guardian, the sale deed is binding on the minors also. The argument could have been accepted, is if third defendant had executed Ext.A3 as the natural guardian representing the minor children defendants 5 to 8. But it is not the case. Defendants 6 to 8 are represented by only the fourth defendant as their guardian. As she cannot be the natural guardian, as rightly found by the

courts below, the sale deed will not bind the rights of the minor children either plaintiffs or defendants 6 to 8. Fourth defendant was joined in the sale deed and by such execution third defendant, who had by that time divested of his right under Ext.A1, cannot transfer any right including that of the minor children in favour of defendants 1 and 2. Therefore they are not entitled to claim any right on that ground. Moreover, without obtaining leave of the court the property of the minors could not have been sold under Ext.A3. Courts below therefore rightly found that Ext.A2 sale deed will bind only fifth defendant, who had 1/6 share in the property. Defendants 1 and 2, being assignees of the fifth defendant, who has 1/6 share in one hector of property, sold under Ext.A2 he can only claim that right. Moreover, in the light of the judgment of this court in C.M.A,whereunder there is a specific finding that defendants 1 and 2 can only claim the fractional share of fifth defendant over the

property transferred under Ext.A2 and not entitled to claim any share in the remaining 2.85 acres covered under Ext.A1, they are not entitled to contend that they are entitled to get a share in the remaining property covered under Ext.A1 or that equity is to be worked out, only on such partition. True, Ext.A2 provides that if the assignees under Ext.A2, cannot claim the right as provided under Ext.A2 the property shown therein as security would be liable for the loss sustained by defendants 1 and 2. The property so provided is the remaining property covered under Ext.A1. That could only be the remaining share of fifth defendant, over the remaining property covered under Ext.A1 excluding the property covered under Ext.A2. But remedy of the appellants in S.A.298/1994 is only to seek enforcement of the said provision under Ext.A2 and cannot resist the present suit. Therefore though learned counsel appearing for appellants in S.A.298/1994 argued that as the other minor children did not file a

suit, courts below should have restricted the relief as against the share of plaintiffs alone. But it was found that Ext.A2 sale deed executed by fifth defendant and his parents are only binding as against fifth defendant and are not binding on defendants 6 to 8, the plaintiffs who are minors. The argument of learned counsel cannot be accepted. The learned counsel then argued that remedy of the minor plaintiffs was lost as provided under section 7 of the Limitation Act as fifth defendant has already attained majority. But when Ext.A2 sale deed is void, as against the rights of the minor children defendants 5 to 8 and plaintiffs, there is no necessity to seek any declaration. They are entitled to ignore the document as against their right. Therefore it cannot be said that courts below were not justified in holding that defendants 1 and 2, are only entitled to 1/6 share of the fifth defendant and plaintiffs and other defendants are entitled to their respective shares. Therefore there is no merit in S.A.298/94

and it is only to be dismissed.

8. The argument of learned counsel appearing for appellants/plaintiffs is that as defendants 1 and 2 purchased the property with the knowledge that the property belonged to the minors also, they cannot claim that they are bona fide purchasers and therefore courts below were not justified in granting the value of improvements to defendants 1 and 2. As rightly found by courts below, it cannot be disputed that defendants 1 and 2 purchased the property from the parents, defendants 3 and 4, and 6 major son the fifth defendant. It is true that as third defendant had already divested his right under Ext.A1 prior to Ext.A2, he had no right over the property covered under Ext.A2 and as third defendant has an independent right and is also not the lawful guardian of minor children she is not entitled to transfer the right of the minor children. But fifth defendant being a major, is entitled to transfer his share. Therefore Ext.A2 sale deed is valid and binding against

fifth defendant as regards the fractional share of fifth defendant.

9. Defendants 1 and 2 admittedly effected improvements in the property by constructing a building, after purchasing the property under Ext.A2. Therefore it cannot be said that the value of improvements so effected was not in their capacity as bona fide purchasers. It is in such circumstance, courts below found that defendants 1 and 2 are entitled to get value of improvements, which was directed to be worked out in the final decree proceedings. I find no reason to interfere with that finding also. There is no merit in the appeals. All the appeals are dismissed. No cost.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.Nos.298/94,312/94,
702 /94

JUDGMENT

9TH OCTOBER, 2007